

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

Shannon **ZAHNR**, Catherine  
Zahrn, Alexius Augustine, and Andrew  
Simpson, on behalf of themselves and  
all others similarly situated,  
*Plaintiffs,*

v.

Rick **PERRY**, in his official  
capacity as Governor of Texas; Greg  
Abbott, in his official capacity as  
Attorney General of Texas; and Dana  
DeBeauvoir, in her official capacity as  
County Clerk of Travis County, Texas,  
*Defendants.*

Civil Action No. 1:13-CV-00955

**Class Action**

**RESPONSE TO DEFENDANTS'  
MOTION TO CONSOLIDATE  
(filed in Case No. A13-CV-0631)**

The Texas Attorney General's Office, on behalf of all State Defendants, has filed a motion to consolidate this case with two others, on the basis that these cases involve common questions of fact and law. (See Doc. 17-5, filed in *McNosky v. Perry*, Case No. A13-CV-0631.)<sup>1</sup> Defendants seek to consolidate all three cases into the *McNosky* case, however, on the sole basis that the *McNosky* case was the first filed. (See *id.* at ¶ 1.) Plaintiffs oppose such consolidation.

Plaintiffs Shannon Zahrn, Catherine Zahrn, Alexius Augustine, and Andrew

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<sup>1</sup> The three cases are: *Zahrn v. Perry*, No. 1:13-CV-00955; *McNosky v. Perry*, No. A13-CV-0631; and *De Leon v. Perry*, No. 5:13-CV-982.

Simpson have filed their suit as a **class action**, on behalf of themselves and all others similarly situated—meaning the proposed Plaintiff Class in this case **already includes** the plaintiffs in the *McNosky* and *De Leon* cases. Thus, if these cases are to be consolidated, it only makes sense to consolidate them under the *Zahrn* class action. *Cf., e.g., In re Enron Corp. Securities Litig.*, 206 F.R.D. 427, 436 (S.D. Tex. 2002) (finding consolidation of individual action under class action was appropriate); *see also In re Corrugated Container Antitrust Litig.*, 80 F.R.D. 244, 245 (S.D. Tex. 1978) (after consolidating individual actions, court found class treatment was appropriate).

Importantly, as the State has noted, these cases involve issues pertaining to same-sex marriage and the litigation of fundamental constitutional rights held by individuals who are homosexual. These cases present constitutional questions of first impression—questions that have received nationwide attention, following the U.S. Supreme Court’s decision in *U.S. v. Windsor*, 570 U.S. ---, 133 S. Ct. 2675 (June 26, 2013). Plaintiffs’ attorneys in this case have extensive experience litigating similar constitutional issues pertaining to same-sex relationships in Texas state courts of appeals, and in the Texas Supreme Court.<sup>2</sup> And Plaintiffs’ attorneys also have extensive experience litigating in federal court. In contrast, upon information and belief, the *McNosky* case has been filed by a *pro se* plaintiff who has no experience litigating any issue of any kind, in any court.

Moreover, the *McNosky* case involves just one couple that wishes to marry in Texas. But the *Zahrn* and *De Leon* cases involve not only plaintiffs who wish to marry in Texas but also **plaintiffs who are already married** under the laws of another state. Thus, the *Zahrn* and *De Leon* cases involve constitutional issues

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<sup>2</sup> Plaintiffs’ attorneys Jody Scheske and Jason Steed are counsel in the two same-sex divorce cases currently pending before the Texas Supreme Court. *See In re Marriage of J.B. and H.B.*, No. 11-0024; *Texas v. Naylor*, No. 11-0114.

pertaining to Equal Protection, Due Process, the Right to Travel, and Full Faith and Credit that are not even potentially present in the *McNosky* case. It is therefore not possible to litigate all the legal issues of all three cases under the *McNosky* case—but it is possible to litigate all the legal issues of all three cases under this class action.

For these reasons, Plaintiffs Zahrn, Zahrn, Augustine, and Simpson—on behalf of themselves and on behalf of the absent members of the Plaintiff Class—oppose consolidation under the *McNosky* case, and instead propose that, if the cases must be consolidated, they be consolidated under this class action.

Respectfully Submitted,

/s/ Jason P. Steed  
Jason P. Steed, SBN 24070671  
**BELL NUNNALLY & MARTIN, LLP**  
3232 McKinney Ave., Suite 1400  
Dallas, TX 75204  
Phone: (214) 740-1411  
Fax: (214) 740-5711  
[jasons@bellnunnally.com](mailto:jasons@bellnunnally.com)

James J. Scheske, SBN 17745443  
**JAMES J. SCHESKE PLLC**  
5501-A Balcones #109  
Austin, TX 78731  
Phone: (512) 371-1790  
Fax: (512) 323-2260  
[jscheske@austin.rr.com](mailto:jscheske@austin.rr.com)

S. Leigh Jorgeson, SBN 24070026 (*pro hac*)  
Ian Pittman, SBN 24064131 (*pro hac*)  
**JORGESON PITTMAN LLP**  
4505 Spicewood Springs Road, Suite 335  
Austin, Texas 78759  
Phone: (512) 320-0999  
Fax: (512) 320-0025  
[leigh@jptexaslaw.com](mailto:leigh@jptexaslaw.com)

Attorneys for Plaintiffs  
Shannon Zahrn, Catherine Zahrn, Alexius  
Augustine, and Andrew Simpson

### Certificate of Service

I hereby certify that the foregoing Opposition to Defendants' Motion to Consolidate was filed on November 18, 2013, on the CM/ECF system. A copy of the foregoing has been sent via U.S. Mail, and (where possible) via email, to:

Christopher Daniel McNosky  
5108 Pleasant Run  
Colleyville, TX 76034

Sven Stricker  
3047 Bent Tree Ct.  
Bedford, TX 76021

Mary Louise Garcia  
Office of Public Records & Civil Courts  
1895 Courthouse  
100 W. Weatherford  
Fort Worth, TX 76196

Barry A. Chasnoff  
[bchasnoff@akingump.com](mailto:bchasnoff@akingump.com)  
Daniel McNeel Lane, Jr.  
[nlane@akingump.com](mailto:nlane@akingump.com)  
Frank Stenger-Castro  
[fscastro@akingump.com](mailto:fscastro@akingump.com)  
300 Convent St., Suite 1600  
San Antonio, TX 78205  
*Attorneys for De Leon Plaintiffs*

Defendants are registered CM/ECF users and will receive service by the CM/ECF system.

/s/ Jason P. Steed

Jason P. Steed